Nos. 22,441 and 22,441-A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,441

SHELL OIL COMPANY, *Appellant,*

v.

RUSSELL L. JONES, *et al., Appellees.*

No. 22,441-A

RUSSELL L. JONES, *et al., Appellants,*

v.

SHELL OIL COMPANY, *Appellee.*

On Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANTS IN NO. 22,441 AND ANSWERING BRIEF FOR APPELLEES IN NO. 22,441A

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TABLE OF CITATIONS

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1. It is hornbook law that courts "will not anticipate a question of constitutional law in advance of the necessity of deciding," *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., dissent-in part). Nevertheless, Plaintiffs below, who are appellants in No. 22441-A and appellees in No. 22,441, insist upon trying to get this Court to decide a constitutional issue which is not

before the Court—*i.e.*, whether plaintiffs to a lawsuit are entitled to frustrate the defendant's discovery by invoking the privilege against self-incrimination and refusing, on that ground, to answer questions during depositions. Throughout their brief they continually maintain that to require them to answer questions in depositions or submit answers to interrogatories would somehow constitute an abridgment of the Fifth Amendment privilege against self-incrimination. But the short answer to their argument is that they have never claimed the privilege.

The law is well settled that the privilege against self-incrimination may not be asserted in advance of questions actually propounded. *Brown* v. *United States,* 356 U.S. 148, 155 (1958); *United States* v. *Harmon,* 339 F. 2d 354 (C.A. 6, 1954), *cert. denied,* 380 U.S. 994 (1965); *Marcello* v. *United States,* 196 F. 2d 437 (C.A. 5, 1952); *Shiner* v. *American Stock Exchange,* 28 F.R.D. 34 (S.D.N.Y. 1961); *United States* v. *Lustig,* 16 F.R.D. 138 (S.D.N.Y. 1954). As the Supreme Court stated in *Brown* v. *United States, supra* at p. 155:

> A witness who is compelled to testify . . . has no occasion to invoke the privilege against self-incrimination until testimony sought to be elicited will in fact tend to incriminate. It would indeed be irrelevant for him to do so.

Clearly then, Plaintiffs' invocation of the privilege before this Court is premature, and this Court should not decide this constitutional question in advance of the necessity for doing so.[1]

2. In any event, it is likewise clear that Plaintiffs may not prosecute this litigation as plaintiffs and at the same

[1] At least one of the Plaintiffs testified before the grand jury which returned the indictment in *United States* v. *California Shell Dealers Association, Inc.* (N.D. Cal. Criminal No. 41348, filed April 26, 1967) and therefore may not claim the privilege against self-incrimination (see Shell's appeal brief, pp. 15-16, 29-35).

time refuse to answer questions on the grounds of the privilege against self-incrimination. *Independent Productions Corp.* v. *Loew's, Inc.,* 22 F.R.D. 266 (S.D.N.Y. 1958); *Henrik Mannerfrid, Inc.* v. *Teegarden,* 23 F.R.D. 173 (S.D. N.Y. 1959), 4 Moore, Federal Practice, ¶ 26.22 [5] at p. 1296 (2d ed. 1963).

Plaintiffs have suggested (Plaintiffs' Brief, p. 30) that the Second Circuit Court of Appeals reversed the decision in *Independent Production Corp.* v. *Loew's, Inc.* However, in fact, the Second Circuit upheld the trial court's decision that a plaintiff may not invoke the privilege against self-incrimination. Its decision reversed a District Court ruling dismissing the complaint because of plaintiff's failure to answer questions in depositions because, it held, the District Court should have first resorted to the remedies provided in Rule 37, *Fed. R. Civ. P.,* rather than ordering a dismissal. *Independent Productions Corp.* v. *Loew's, Inc.,* 283 F. 2d 730 (C.A. 2, 1960).

3. Plaintiffs also suggest that Shell has asserted that they have irrevocably waived the constitutional privilege against self-incrimination (Plaintiffs' Brief, p. 24). Plaintiffs, however, misconstrue Shell's position. Shell maintains, and the relevant cases hold, not that Plaintiffs have irrevocably waived their privilege, but that Plaintiffs may not institute a lawsuit and then refuse to answer relevant questions by invoking the privilege against self-incrimination. In an analogous situation, the Supreme Court has held that a witness who voluntarily takes the stand and testifies may not refuse to answer questions on cross-examination on the grounds that such answers may tend to incriminate him. *Brown* v. *United States, supra.* As the Court stated at pp. 155-156:

> Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the

> Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute.

Similarly here, Plaintiffs having put certain matters into dispute by initiating this lawsuit cannot reasonably claim that the Fifth Amendment gives them an immunity from examination on these matters.

In any event, if Plaintiffs believe that any questions asked may tend to incriminate them, they should claim the privilege if and when these questions are asked so that the District Court may rule on their claim. As the Supreme Court stated in *Hoffman* v. *United States,* 341 U.S. 479 (1951), a decision relied upon by Plaintiffs throughout their brief, "The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the Court to say whether his silence is justified." *Id.* at p. 486; *Rogers* v. *United States,* 340 U.S. 367, 374 (1951).

4. Plaintiffs throughout their brief take the inconsistent position that although the Federal Rules provide for full pre-trial discovery, they will not fully cooperate and give full and open disclosure unless this Court permits them to keep such discovery secret. Thus, at page 9 of their brief, plaintiffs state:

> The liberality of pre-trial discovery under the Federal Rules of Civil Procedure is surely one of the most beneficial and enlightened developments in modern jurisprudence. Private party litigants in the federal courts have the right to full pre-trial disclosure of opponents' cases.

Yet, elsewhere in their brief, plaintiffs threaten the Court that:

> Without the protective orders it would be only natural for the plaintiffs to give extremely guarded testimony and answers (*Id.* at p. 14, and see *Id.* at p. 12).

Indeed, Plaintiffs take the anomalous position that sealing their depositions and answers to interrogatories "would foster and encourage a more effective program of discovery by Shell." (*Id.* at p. 20). However, contrary to Plaintiffs' contention, they have a duty to "cooperate in the discovery process" (*Id.* at p. 12) regardless of whether or not this Court holds that the fruits of discovery should be sealed.[2]

5. Contrary to Plaintiffs' assertion (*Id.* at pp. 21-22), Shell has not read a portion of the protective order out of context. The protective order specifically bars Shell or its attorneys from disclosing the contents of the depositions of Plaintiffs to "operating personnel of the defendant or to any third party" (R. 152). Certainly, under the specific terms of the order, counsel for Shell could not disclose the contents of these depositions when questioning Shell's operating personnel or other third parties.[3]

6. Plaintiffs' reliance upon the dicta in *United States* v. *American Radiator and Sanitary Corp.,* 1967 Trade Cases ¶ 72,311 (C.A. 3, 1967), *cert. denied,* 36 U.S. Law Week 3308 (January 29, 1968), is misplaced. That case, and all of the other cases relied upon by Plaintiffs to support their position, involved the sealing of depositions where a party

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[2] It should be noted that, contrary to Plaintiffs' suggestion, they have not been cooperating in the discovery in this case. Thus, despite the existence of Judge Weigel's sealing order, Plaintiffs, in December 1967, unilaterally announced that they would no longer submit themselves to deposition by Shell until ordered to do so by the District Court.

[3] Although Plaintiffs insist that Shell is conducting discovery in this case for the government's benefit and is actually prosecuting this appeal on the government's behalf (Plaintiffs' Brief, p. 19), this assertion is not supported by the record. Indeed as counsel for Shell made clear below, "I don't work for the Department of Justice and I couldn't care less what happens in that case" (Tr. 12).

is a defendant in both a civil and a criminal case.[4] As explained in Shell's appeal brief, these cases are not apposite to the situation presented in this appeal.

7. Finally, although Plaintiffs do not attempt to justify the provision of Judge Weigel's order which requires Shell to turn over to Plaintiffs, at the termination of this litigation, all copies of their depositions, they now contend that this provision does not violate the due process clause of the Fifth Amendment because these transcripts do not have some inherent value (Plaintiffs' Brief, pp. 15-16). We are aware of no cases, and Plaintiffs cite none, which hold that property must have a large monetary value before a party is entitled to invoke the due process clause of the Fifth Amendment. Aside from the fact that these transcripts may be of future use to Shell in any future litigation involving Plaintiffs or other parties, the important fact is, that having already paid thousands of dollars for the transcripts, Shell is entitled to retain possession of them.

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[4] In *United States* v. *Simon*, 373 F. 2d 649 (C.A. 2 1967), *certiorari granted sub nom. Simon* v. *Wharton*, 386 U.S. 1030 (1967), cited at p. 9 of Shell's brief and p. 22 of Plaintiffs' brief, the Supreme Court entered the following *per curiam* order on December 18, 1967:

> Upon consideration of the joint motion to vacate, the judgments of the lower courts are vacated and the case is remanded to the United States District Court for the Southern District of New York with instructions to dismiss the case as moot (36 U.S. Law Week 3252).

CONCLUSION

For the foregoing reasons, and for the reasons stated in Shell's appeal brief, the Court should reverse the District Court's order in No. 22441 and affirm the District Court's order in No. 22441-A.

Respectfully submitted,

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Dated: February 9, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney